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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1403

PHILIP JAMES GRAZIANI,
Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID A. FABER
JOHN O. KIZER
1200 Charleston National Plaza
Charleston, West Virginia 25301
Counsel for Respondent

Of Counsel:
CAMPBELL, LOVE, WOODROE & KIZER
1200 Charleston National Plaza
Charleston, West Virginia 25301

April 12, 1974

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Argument	6
I. The Decision Below is Clearly Correct	6
A. The Fifth Amendment Argument	7
B. The Sixth Amendment Argument	8
C. The Due Process Argument	9
II. There is No Conflict of Decision	13
Conclusion	15

CITATIONS

CASES:

Ex Parte Wall, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882)	10
Florida Bar v. *Massfeller*, 170 So. 2d 834 (Fla. 1964)	14, 15
Florida State Board of Architecture v. *Seymour*, 62 So.2d 1 (Fla. 1952)	14
In re Robertson, W.Va. , 194 S.E.2d 650 (1973)	3

Page

In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917), cert. den. 246 U.S. 661, 38 S.Ct. 332, 62 L.Ed. 927 (1918) 7, 8, 12, 13, 14, 15

In re Schwartz, 54 Ill. 2d 334, 282 N.E.2d 689 (1972), cert.den. 409 U.S. 1047, 93 S.Ct. 527, 34 L.Ed.2d 499 (1972), reh.den. 410 U.S. 917, 93 S.Ct. 959, 35 L.Ed.2d 281 (1973) 7, 8, 12, 15

Lurie v. *Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973) 14, 15

Ullmann v. *United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), reh.den. 351 U.S. 928, 76 S.Ct. 777, 100 L.Ed. 1457 (1956) 8

UNITED STATES CONSTITUTION:

Fifth Amendment 6, 7, 8

Sixth Amendment 6, 8

Fourteenth Amendment 7

FEDERAL STATUTES:

18 U.S.C. §201 3

18 U.S.C. §1952 3

WEST VIRGINIA STATUTE:

Chapter 57, Article 5, Section 2, West Virginia Code, 1931, as amended 2, 7, 8, 10

MISCELLANEOUS:

Random House Dictionary of the English Language (unabr. ed. 1967) 12

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OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported unofficially at 200 S.E. 2d 353 and is included in the Petition as Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the testimony of an attorney given before a grand jury under a grant of immunity may be used as evidence in a disbarment proceeding against him.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the single statute involved (Chapter 57, Article 5, Section 2, West Virginia Code, 1931, as amended) are set forth in the Petition at pp. 3-4.

STATEMENT OF THE CASE

The petitioner, Philip James Graziani, was licensed to practice law in the State of West Virginia on June 3, 1953. On November 20, 1973, upon the complaint of the Committee on Legal Ethics of the West Virginia State Bar, respondent herein, the Supreme Court of Appeals of West Virginia issued the opinion below annulling petitioner's license to practice law. The salient facts in the chain of events leading to petitioner's disbarment are as follows.

On December 10, 1969, petitioner voluntarily testified before the Grand Jury of Kanawha County, West Virginia pursuant to an order of the Intermediate Court of Kanawha County granting him "* * * complete legal immunity thereto as the law provides and said Philip Graziani is hereby granted full and complete immunity from prosecution under Federal or State laws * * *." (The full text of the grant of immunity is included in the Petition at p. A-14 as Appendix D.) It is uncontradicted that the grant was extended to petitioner pursuant to West Virginia Code, §57-5-2, the text of which may be found in the Petition at pp. 3-4.

Some twenty months after testifying before the Kanawha County Grand Jury as aforesaid, the petitioner, on August 5, 1971, appeared before a grand jury of the United States District Court for the Southern District

of West Virginia and testified that C. Donald Robertson, a former Attorney General and candidate for Governor of West Virginia, and Dana Aubrey Robertson, his brother, had conspired to bribe and did bribe James Frederick Haught who, at the time, was serving as Federal Housing Commissioner of West Virginia. Thereafter, C. Donald Robertson, Dana Aubrey Robertson and James Frederick Haught were indicted for violating Section 201, Title 18 of the United States Code (bribery of a public official) and Section 1952, Title 18, United States Code (interstate transportation in aid of racketeering enterprises.) All three pleaded guilty, were fined and imprisoned. In a subsequent proceeding the licenses to practice law of the Robertsons were annulled. A more detailed account of the facts concerning the Robertsons' guilty pleas and the subsequent annulment of their licenses to practice law is contained in *In re Robertson*, W.Va. , 194 S.E. 2d 650 (1973).

The Committee on Legal Ethics of the West Virginia State Bar learned of petitioner's testimony before the federal grand jury from statements in the public press and statements of the United States Attorney made in open court at the arraignment of the Robertsons. Believing from such statements that petitioner may have been involved in the bribery scheme to which the Robertsons and Haught had pleaded guilty, the Committee, on February 12, 1973, filed a petition in the United States District Court for the Southern District of West Virginia to obtain disclosure of the federal grand jury testimony of petitioner and one Arthur J. Tarley, who had also given testimony leading to the indictments of the Robertsons and Haught. Over the objection of petitioner's counsel the United States District Court granted disclosure of the testimony of petitioner and Tarley.

After reviewing the grand jury testimony the Committee on Legal Ethics determined to bring charges against petitioner and duly served him with such charges and with notice of a formal hearing to be held before the Committee on such charges. The formal hearing was held on May 3, 1973.

It is important to note that the grand jury testimony of Arthur J. Tarley was considered by the Committee only in its investigative role prior to bringing charges against petitioner. The Court must not be misled by statements in the Petition suggesting that Tarley's testimony was used as evidence against petitioner. (See, for example the second paragraph on page 12 of the Petition.) At no point was Tarley's testimony used as evidence to support or justify the charges against petitioner; the record makes this abundantly clear. Tarley's testimony was not used at the formal hearing before the Committee of the charges against petitioner and it was not introduced into evidence in the proceedings before the Supreme Court of Appeals of West Virginia which resulted in petitioner's disbarment.

At the formal hearing before the Committee petitioner's attorney appeared and objected to the use of the grand jury transcript of petitioner's testimony contending that the grant of immunity extended to petitioner was broad enough to foreclose a disbarment proceeding. When given the opportunity to present evidence in petitioner's behalf counsel for petitioner declined, stating that the petitioner would rely solely on his immunity defense to the charges against him. Petitioner's motion to dismiss based on such ground was denied by the Committee.

Petitioner's own testimony before the federal grand jury as considered by the Committee and duly of record

in this case reveals the following facts: During 1968 and part of 1969 petitioner was engaged with Dana Aubrey Robertson in a partnership for the practice of law known as Graziani & Robertson. One of the clients of Graziani & Robertson was Centurion Corporation, a construction company. The President of Centurion Corporation was Arthur J. Tarley. Tarley and James Frederick Haught, who was then Federal Housing Director of West Virginia, entered into an arrangement whereby Tarley would pay Haught a "finder's fee" of fifty dollars for each apartment unit Centurion was employed to construct on federally-funded projects. In return for this money Haught was to use his official position and influence to direct contracts and federal funds to Centurion Corporation. Tarley informed petitioner of this arrangement and it was agreed that Tarley would forward the "finder's fees" to petitioner who would then personally deliver them to Haught in cash. The payments would thus be disguised as legal fees paid by Centurion to petitioner.

On six separate occasions over a period of approximately sixteen months, petitioner passed a total of $18,700.00 in cash to Haught. The money was passed in various clandestine meetings at various places including the lobby of a Charleston, West Virginia, office building and at least once in a parked automobile. Petitioner was also aware of additional payments totalling $12,500.00 delivered to Haught by the petitioner's law partner, Dana Aubrey Robertson; the source of this $12,500.00 was the partnership account of Graziani & Robertson.

At the close of the formal hearing the Committee on Legal Ethics concluded that petitioner had been engaged in bribery and conspiracy to commit bribery and was thus guilty of professional misconduct. Accordingly,

the Committee, following appropriate West Virginia procedure, filed a complaint in the Supreme Court of Appeals of West Virginia seeking annulment of petitioner's license to practice law. After a full hearing, including submission of briefs and oral argument, petitioner was disbarred. (The order annulling petitioner's license to practice law is attached to the Petition at p. A-2 as Appendix A.)

ARGUMENT

This case presents but one issue and that issue is itself an old question heretofore resolved correctly in all its ramifications. Try as petitioner may to find various unresolved constitutional problems lurking in this case and try as he might to present the matter in a fresh light the true nature of this case cannot be disguised. The sole question presented is this: Can the former testimony of an attorney given under a grant of immunity be used as evidence in a subsequent disbarment proceeding against him?

I.

THE DECISION BELOW IS CLEARLY CORRECT

The Petition, in taking the position that Philip Graziani's federal grand jury testimony cannot be used against him in a disbarment proceeding, makes essentially three arguments based on the Constitution of the United States, all of which have been previously resolved and none of which requires or justifies review by this Court. Petitioner asserts that he was compelled to be a witness against himself in violation of the Fifth Amendment; he charges that he was denied his Sixth Amendment right to confront the witnesses against him; and he maintains the proceedings below were so lacking in the "basic rudiments of fair play" that they constituted a denial of due

process of law contrary to the Fourteenth Amendment. None of these arguments has merit.

A. The Fifth Amendment Argument

During the past half-century many courts have weighed the propriety of using an attorney's former testimony, given under a grant of immunity, as evidence in a disbarment proceeding against him. The fountainhead case is a 1917 opinion written by Justice Benjamin Cardozo who was then a Judge of the Court of Appeals of New York. In that case, *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917), cert. den. 246 U.S. 661, 38 S.Ct. 332, 62 L.Ed. 927 (1918), an opinion typically remarkable both for the logic of its reasoning and the lucidity of its prose, Judge Cardozo held that the constitutional privilege against self-incrimination applies only to criminal proceedings. A "proceeding looking to disbarment" was held not to be a criminal case.

In re Rouss has been often followed in subsequent cases. Respondent, rather than engage in a tedious review of such cases, directs the Court to *In re Schwartz*, 51 Ill. 2d 334, 282 N.E. 2d 689 (1972), cert. den. 409 U.S. 1047, 93 S.Ct. 527, 34 L.Ed.2d 499 (1972), reh. den. 410 U.S. 917, 93 S.Ct. 959, 35 L.Ed.2d 281 (1973), to illustrate the continuing vitality of the principles enunciated in *Rouss*.

In addition to making the Fifth Amendment argument rejected in the line of cases exemplified by the *Rouss* and *Schwartz* decisions, petitioner has contended that West Virginia Code, §57-5-2, pursuant to which the grant of immunity here involved was extended to petitioner, is broad enough to confer immunity from "administrative," as well as criminal, proceedings. This, however, is not a question of federal constitutional law—it is a matter of

statutory construction properly committed to the courts of West Virginia for resolution. Accordingly, the Supreme Court of Appeals of West Virginia, in the opinion below and in prior cases there cited, has ruled that §57-5-2 authorizes grants of immunity from criminal prosecution only. Such statutes so construed have been repeatedly held constitutional. The decisions illustrate that the Fifth Amendment protection extends only to criminal prosecutions. The fact that a witness might be subject to non-criminal disabilities or liabilities as a result of testimony given under a grant of immunity does not render the immunity inadequate. Such risks, not of a criminal nature, do not fall within the Fifth Amendment's guaranty against self-incrimination. *Ullmann* v. *United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), reh. den. 351 U.S. 928, 76 S.Ct. 777, 100 L.Ed. 1457 (1956).

The opinion below is one of many cases which follow the reasoning of the *Rouss* and *Schwartz* decisions. It correctly holds that the Fifth Amendment (and the West Virginia immunity statute) applies only to criminal prosecutions and that a disbarment proceeding is not a criminal prosecution.

B. The Sixth Amendment Argument

The only possible basis for petitioner's argument that he was denied the right to confront the witnesses against him is his suggestion, completely unsupported by the record, that the grand jury testimony of Arthur J. Tarley was used as evidence against him. The respondent Committee did obtain disclosure of Tarley's testimony, but never was such testimony used in any way as evidence to support the Committee's action. It was not introduced into evidence at the Committee hearing of the charges

against petitioner and it was not used in any capacity in the proceeding before the Supreme Court of Appeals of West Virginia which resulted in annulment of petitioner's license to practice law. It is elementary that the constitutional right of confrontation is the right of a person to confront and cross-examine witnesses who present evidence against him. At no time has Tarley been a witness against petitioner—at no time has Tarley's testimony been used as evidence against petitioner. Petitioner's contention that he was denied the right to confront Tarley is therefore without merit.

C. The Due Process Argument

The several-stranded rope with which petitioner seeks to bind his Petition together is the assertion that the proceedings against him were so lacking in "the basic rudiments of fair play" as to constitute a denial of due process of law. This fundamental fairness argument is woven throughout the Petition. Although petitioner points to at least four aspects of this case as denying him due process, his fundamental fairness argument does not stand up under scrutiny.

First, petitioner asserts that he was found guilty of a felony although never charged, indicted or tried for his alleged offenses. This is patently ridiculous. Petitioner was found to have admitted under oath his own complicity in a bribery scheme. It was determined that this complicity constituted professional misconduct requiring annulment of his license to practice law. He was not adjudged guilty of any crime nor was any criminal penalty or punishment imposed upon him. Petitioner's clever attempt to disguise the proceedings against him by describing them in terms appropriate only to a criminal case cannot obscure their true nature. Disbarment

proceedings have been repeatedly held to be neither civil proceedings nor criminal prosecutions, but are special proceedings, peculiar to themselves. Although some detriment will necessarily accrue to the attorney involved, a disbarment proceeding is not for the purpose of punishment but to protect the public and the courts from unfit practitioners. *Ex parte Wall*, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882).

The second element of petitioner's due process argument is that, although West Virginia Code, §57-5-2, authorizes grants of immunity from criminal prosecution only, the particular immunity conferred upon him pursuant to that statute was broader than the statute itself and renders him immune to disbarment proceedings as well as to criminal prosecutions. In support of his contention he cites the wording of the grant of immunity extended to him by the Intermediate Court of Kanawha County, West Virginia, and he has submitted affidavits of various investigative agents who contend that an immunity broad enough to cover disbarment proceedings was intended. (The grant of immunity is included in the Petition at p. A-14 as Appendix D; the investigating agents' affidavits are included in the Petition collectively as Appendix E beginning on p. A-16 thereof.)

An examination of the grant of immunity itself does not support petitioner's contention. It is clear that the Intermediate Court of Kanawha County intended to act within the authority conferred by the statute—the grant states that Philip Graziani "shall have complete legal immunity * * * *as the law provides* * * *." (emphasis supplied)

Additionally, it is clear that the Intermediate Court, even if it had intended to grant an immunity broader than the statute contemplates, would lack the authority

to confer such a grant. Furthermore, the affiants, if they promised petitioner a broader grant, were acting beyond their authority in so doing. The grant of immunity is a creature of statute. The statute authorizes immunity from criminal prosecution only. Surely it cannot be maintained that investigative agents, acting beyond their statutory authority, can by such acts restrict the power of the respondent Committee to bring charges against attorneys guilty of professional misconduct or restrict the authority of courts to discipline attorneys.

It will be noted that petitioner is a lawyer and had highly competent legal counsel available to assist him. He could read for himself the immunity statute and cases construing it as well as the line of cases holding that former testimony given under a grant of immunity may be used as evidence in disbarment proceedings. There is no reason to believe he did not testify with full knowledge of the possible consequences. The assertion that he was "trapped" into believing he enjoyed a privilege he did not receive is thus without merit.

Petitioner's third contention to support his assertion that he was denied due process is that, by using his own grand jury testimony against him, the burden of proof was somehow shifted to him requiring him to prove his own innocence. This theory is not developed in the Petition although it is asserted therein. In reply, respondent merely points out that petitioner has never questioned or attempted to rebut the facts which are in evidence. His own testimony clearly reveals what he himself did. He has been given every opportunity to explain or rebut such testimony, but has steadfastly refused to do so.

The Supreme Court of Appeals of West Virginia has consistently held, as it did in the opinion below, that to sustain a disciplinary charge against an attorney the

evidence must be full, preponderating and clear. (This test, it may readily be seen, lies somewhere between the preponderance test applied in civil cases and the reasonable doubt standard of the criminal law and is thus a further indication that a disbarment is neither a civil nor a criminal case but a special type of proceeding.) By obtaining the best evidence available—petitioner's own account of what he himself did—and properly introducing it into evidence the Committee has, without question, complied with its burden of proof and shown petitioner guilty of professional misconduct.

The fourth element of petitioner's due process argument is that the character of a disbarment should be determined not by its nature but by its effect, that the effect of the proceeding against petitioner was punishment as in a criminal case, and therefore his disbarment proceeding was a criminal proceeding. None of the cases cited by petitioner in support of this ingenious argument is apposite on its facts to the case at bar. In none of the cases cited by petitioner is a disbarment held to be purely criminal either in nature or effect—the most any of these cases holds is that such a proceeding is quasi-criminal in nature. The word "quasi" means "resembling" or "seemingly but not actually." See the Random House Dictionary of the English Language (unabr. ed. 1967). Thus, a proceeding cannot be criminal and quasi-criminal at the same time. To say a disbarment proceeding is quasi-criminal is merely to state in a different way the general rule established in the *Rouss-Schwartz* line of cases, discussed above—that disbarment proceedings are neither civil actions nor criminal prosecutions but are "special proceedings, peculiar to themselves."

Petitioner's claims that he was "misled" or "unfairly treated" fly in the face of the facts. Petitioner's own

admissions more than satisfy the evidentiary test. What better evidence can there be than Philip Graziani's own account of what he himself did? Additionally, petitioner was given the opportunity at the formal hearing held by the Committee on the charges against him to present evidence in rebuttal to his own grand jury testimony. He declined to do so. His own testimony is uncontradicted—the evidence that he was involved with C. Donald Robertson and Dana Aubrey Robertson in a conspiracy to bribe James Frederick Haught and that he passed money to Haught on various occasions in furtherance of this sordid scheme is uncontradicted.

The disciplinary action taken by the Supreme Court of Appeals of West Virginia in this case is fully supported and justified by the gravity of petitioner's admitted misconduct. Consider the fate of the others involved in the bribery of Haught. Haught and both Robertsons have been fined and imprisoned. The Robertsons have also had their licenses to practice law annulled. Disbarment of petitioner, even if considered to be punishment, leaves him untouched by the criminal convictions, the fines and the imprisonment imposed on those who acted in concert with him. Petitioner has been duly rewarded for cooperating with law enforcement officials, else he too would be today in prison.

II.

THERE IS NO CONFLICT OF DECISION

The Petition devotes several pages to a lengthy discussion of Florida cases which, it is argued, represent a "modern view" distinct from the line of cases following *In re Rouss*, supra. (See pages 12 through 24 of the Petition.) Although petitioner does not openly assert that these cases are in conflict with decisions from other jurisdictions, such a conclusion seems to be implicit in his

argument. An examination of the Florida cases, however, does not bear this out. In fact, Florida law, although it deviates in cases involving practitioners of other professions, is firmly in line with the majority viewpoint when it comes to lawyers.

In *Florida State Board of Architecture* v. *Seymour*, 62 So. 2d 1 (Fla. 1952), the Supreme Court of Florida held that a proceeding to revoke an architect's certificate was a prosecution to effect a penalty or forfeiture under the Florida immunity statute. When the question subsequently arose as to whether the former testimony of an attorney could be used as evidence against him in a disbarment proceeding the Florida Court distinguished the *Seymour* case and held that an attorney's former testimony could be used against him. That case, *Florida Bar* v. *Massfeller*, 170 So. 2d 834 (Fla. 1964), specifically followed Justice Cardozo's opinion in *In re Rouss*, supra. *Florida State Board of Architecture* v. *Seymour* was distinguished as having no application to a disbarment proceeding. The following statement of the Florida Court in the *Massfeller* case found at 170 So. 2d 834, 838-839, leaves no doubt as to the state of the law in Florida:

> "* * * [W]e hold that Sec. 932.29 [the Florida immunity statute] has no applicability to members of the Florida Bar and that respondent cannot cloak himself with immunity from such a [disbarment] proceeding by virtue of the provisions of such statute. In so holding we find ourselves in accord with the decisions of the highest courts of appeal of other states, for it is uniformly held that immunity statutes of the character of Sec. 932.29 do not extend to disciplinary proceedings by courts of members of the Bar."

The other Florida cases cited by petitioner do not change or restrict the ruling in *Massfeller*. *Lurie* v.

Florida State Board of Dentistry, 288 So. 2d 223 (Fla. 1973), in which petitioner takes great comfort, merely held that a dentist could not have his license to practice revoked on the basis of former testimony given under a grant of immunity. The *Mansfield* case was not overruled or distinguished or even mentioned in *Lurie*; there is not the slightest suggestion in *Lurie* that the ruling of that case (itself a controversial "four to three" decision by a sharply divided court) is meant to apply to lawyers.

The most that can be drawn from the Florida cases is that Florida holds attorneys to stricter standards than are applied to practitioners of other professions, and such a distinction is warranted, for lawyers are officers of the courts in whose hands rests much of the responsibility for the administration of justice.

Even if the Florida law were inconsistent with cases such as *In re Hume*, supra, and *In re Schwartz*, supra, it would merely represent a minority viewpoint completely out of step with general law and in no way binding upon the courts of West Virginia.

CONCLUSION

The Petition contains much citation of authority and is replete with skillfully contrived arguments designed to put old wine in a new bottle. Not one case cited, however, holds that the former testimony of an attorney given under a grant of immunity is inadmissible as evidence against him in a disbarment proceeding. On the contrary, numerous cases, of varying vintage, hold that such testimony can, consistent with constitutional protections, be used to support an attorney's disbarment. The law on the question involved in this case is clear and settled and has been for many years.

Respondent respectfully submits that the decision below is clearly correct; that it is fully consistent with established law; that it is just and fair and violates none of petitioner's constitutional rights. The public interest and the honor and dignity of the legal profession compel that attorneys who use their professional positions to engage in bribery and conspiracy to commit bribery no longer be permitted to practice law and hold themselves out to the courts and to the public as professionally and ethically qualified.

Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. FABER
JOHN O. KIZER
Counsel for Respondent

April 12, 1974

PROOF OF SERVICE

I, John O. Kizer, one of the attorneys for the Committee on Legal Ethics of the West Virginia State Bar, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1974, I served copies of the foregoing Brief for Respondent in Opposition on Philip James Graziani, the petitioner, by mailing three copies thereof in an envelope duly addressed, with first class postage prepaid, to his attorneys of record Leo Catsonis and Thomas L. Linkous, 207 Security Building, Charleston, West Virginia 25301.

It is further certified that all parties required to be served have been served.

JOHN O. KIZER
1200 Charleston National Plaza
Charleston, West Virginia 25301